

Executive Officer II (EO2) and the museum's director. The EO2 position is covered by the collective bargaining agreement between the State of Iowa and AFSCME Iowa Council 61. Colbert has been employed by the State since 2007. As director, she manages the museum's operations. Colbert reports to the State's Quartermaster, who at the time of the incident was Brigadier General Randy Greenwood. Colbert was the Public Defense's first museum director. According to Greenwood, the relationship between the museum's board and Colbert has been difficult, and there have been instances of unprofessional behavior and argumentative exchanges by both Colbert and the Board. In response to one particular Board meeting, Greenwood issued Colbert a work directive to establish his expectations of what constituted professional work behavior. The December 15, 2016, work directive provided in part:

1. The following items are a directive for your work day duties. These directives are within the rights of management specifically to impose limits to duties conducted while in the employ of the State of Iowa and are not to be considered disciplinary. Failure to follow the directives listed may result in disciplinary action up to and including termination of employment.
2. The following conduct and behavior is specifically prohibited:
 - a. Raising your voice in an argumentative manner during staff and board meetings.
 - b. Swearing, using curse words of any kind or context.
 - c. Name calling characterizing of members of staff, board, or volunteers.
 - d. Interruptions and rude interactions with staff and board.

3. The following duties, practices, and activities are specifically required:

a. Professional conduct during staff meetings, board meetings, and all other interactions with personnel and staff.

4. These directives are effective immediately and continue until amended or removed via written communication by management.¹

The State-AFSCME collective bargaining agreement addresses the implementation of work directives given to employees. In particular, Article IV, section 9 provides in relevant part: “[w]ritten reprimands, clarifications of expectations, or other similar memoranda shall be removed from the employee’s personnel file after one (1) year provided no further disciplinary action has been taken against the employee.”² Although there was testimony that Greenwood issued a second work directive, the record does not contain evidence of this directive.

In May, 2018, Brigadier General (Retired) Altman contacted Greenwood about Wells Fargo employees volunteering at the Gold Star Museum. In July, 2018, Colbert began working with Altman concerning the volunteer project that was scheduled for the afternoon of September 11, 2018. On September 5, Colbert submitted a leave request for 32 hours beginning Monday, September 10, but noted that she would be working the afternoon of September 11. On Friday, September 7, Colbert emailed Greenwood an updated plan due to the increased number of volunteers. This plan included the volunteer activity,

¹ Exhibit 2.

² Exhibit 20.

number of volunteers participating in the activity, and in some cases the staff member who would be working with the volunteers. The next day, Colbert sent Greenwood an email which included the note she would “be in Tuesday afternoon to work with the Wells Fargo volunteers and Gen. Altman.”

On the morning of the event, Greenwood visited the museum to check on the preparations. There he found Michael Vogt, museum curator who, according to Greenwood, was unorganized because he “wasn’t quite sure what was going on.” Greenwood shared the list of duties prepared by Colbert with Vogt. Vogt and Greenwood then prepared an agenda based upon the task list prepared by Colbert. Prior to the event, Greenwood explained the agenda to Colbert, and asked Colbert if she would like to speak. She declined.

When the event began in the afternoon of September 11, Altman introduced Greenwood who welcomed the volunteers and told them a little about the museum. He then asked Colbert if she would like to say a few words. After Colbert declined, Greenwood (unbeknownst to Colbert) announced that Vogt, not Colbert, would give a short tour of the museum and hand out the volunteer assignments. At that point, Colbert left the meeting room and sat on a bench in the lobby. Seeing Colbert leave, Altman went and spoke to her. There is a discrepancy as to what was said. According to Altman, Colbert was upset because she had done all the work and Vogt got to hand out the assignments. In her investigative statement, Colbert told Altman

she was fine. Later, Altman relayed his fears to Greenwood that he had upset Colbert.

At approximately 2:00 p.m., while the event was taking place, Colbert entered Susan Hansel's office, Greenwood's executive assistant, and asked to speak with Greenwood. She was unable to speak with Greenwood as he was in a meeting with Major Robby Cain, but entered his office shortly after the meeting ended. According to Colbert, she went to see Greenwood because she wanted to know why he had asked Vogt to hand out the assignments, as she had been working on this project for several months. She felt that Greenwood had disrespected her, and thus wanted an explanation and an apology.

Colbert did not testify. Based upon her witness statement, Colbert believes that she and Greenwood were having a conversation. She admits that she was probably talking loudly because she has a loud and powerful voice, but so was Greenwood. Further, Colbert denied she was yelling or that she interrupted Greenwood.

Three employees, Cain, First Lieutenant Joshua Dunt and Hansel were in the vicinity of Greenwood's office and heard the interaction between Colbert and Greenwood. All three stopped in order to monitor the loud discussion and comments coming from Greenwood's office. The witnesses stated Colbert was yelling, shouting, or talking in an extremely loud or elevated voice. Both Cain and Hansel described Colbert's actions as unprofessional, and noted that Colbert kept interrupting Greenwood. Hansel said Colbert was in Greenwood's

space, and pointing her finger at him as she spoke. The witnesses described Greenwood's demeanor as relatively calm and noted that Greenwood repeatedly asked Colbert to calm down. Greenwood admits that Colbert "might have had it in her mind how she wanted things to go and I circumvented that somehow ... but it was definitely not an appropriate way to handle a miscommunication in any type of situation."³ According, to Greenwood, Colbert left his office after being told "[t]his conversation is over. You're not rational enough to hear what I've got to say so please leave."⁴

Colbert left Greenwood's office but returned a short time later as she wanted him to sign off on her timesheet so she could go home. Although not corroborated by Colbert's statement, others testified that it was a loud discussion. According to Greenwood, Colbert left his office when he told her that the conversation was over, and she needed to leave his office. According to Colbert, she heard Greenwood talking, said "whatever General" and left.

It is unclear how long the whole encounter lasted. Dunt estimated 5 to 10 minutes, Hansel believes it lasted approximately 10 to 15 minutes, and Greenwood estimated it lasted between 60 seconds and two minutes.

After the incident, Greenwood filed a complaint with the Iowa National Guard Human Resources Office alleging that Colbert was insubordinate and broke the December 15, 2016, work directive. Additionally, he requested an investigation. Attached to the complaint were statements by Greenwood,

³ Transcript at 38.

⁴ Transcript at 38.

Hansel, Cain and Dent. On September 24, 2018, Major General Timothy Orr, Iowa National Guard and Adjutant General, appointed Heather Dolbeare, a federal employee with the Department of the Army, to investigate “the circumstances surrounding an incident that occurred between Brigadier General Greenwood (Brig Gen) and Ms. Sherrie Colbert on 11 September 2018.” She was told the purpose of the investigation was to determine if Colbert was insubordinate and whether there were violations of the December 15, 2016, work directive. Additionally, she was directed to “gather facts” from Cain, Hansel and Dunt and others, and told to review the section of the DAS managers & supervisory manual titled “conducting and documenting disciplinary investigations.”

Dolbeare, who was Director of Internal Review, had never conducted a disciplinary investigation, but believed that it was similar to internal audits that she had conducted.

As instructed, Dolbeare’s investigation consisted of reviewing the four witness statements (Greenwood, Dunt, Cain and Hansel), and conducting seven interviews (Greenwood, Dunt, Cain, TeKippe, Hansel, Altman and Colbert.)⁵ Dolbeare interviewed Greenwood first and Colbert last. The interviews varied in length from 5 minutes to Colbert’s 25-minute interview. All the statements, including Colbert’s, were relatively consistent about the event. The key inconsistencies pertained to the conversation’s volume and

⁵ The statements contained in the record were summaries of the various interviews, however, the State provided a cd which contained the interviews.

whether Colbert interrupted Greenwood. Colbert stated that during the discussion Greenwood told her she was acting like a “spoiled brat.” None of the witnesses were interviewed a second time to determine if anyone had heard Greenwood call Colbert a “spoiled brat.” According to Dolbeare, she did not ask Greenwood about the “spoiled brat” comment because the investigation’s purpose was to investigate Colbert’s actions, not the actions of Greenwood.

On October 2, 2018, Dolbeare prepared her investigation report. In the report, Dolbeare found that Colbert had violated the December 15, 2016, work directive by (1) raising her voice in an argumentative manner during staff or board meetings, (2) by engaging in interruptions and rude interactions with staff and board, (3) failing to engage in professional conduct during staff meetings, board meetings and other interactions with personnel and staff and (4) by demonstrating insubordinate behavior through her conduct. The report did not include recommendations as to discipline because that was not Dolbeare’s role. Along with the report, Dolbeare attached the interview notes, witness statements and digital voice recordings of all key witnesses.

Dolbeare submitted the report and documents to Major George Mosley, HRO Plans and Policies Officer. There is no evidence as to who reviewed Dolbeare’s findings, nor is there evidence in the record as to what just cause factors were used to determine the appropriate level of discipline.

On October 16, 2018, the State issued Colbert a one-day paper suspension signed by Gary Frees, Colbert’s new supervisor. The letter advised

Colbert that the State had concluded the investigation and that Colbert's conduct had violated the December 15, 2016, work directive. As a result, a one-day paid suspension was imposed.

Colbert appealed the one-day paper suspension on October 22, 2018, and DAS issued the third-step response on November 20, 2018, denying Colbert's claim. Colbert timely appealed the third-step response to PERB on December 11, 2018.

CONCLUSIONS OF LAW

Colbert alleges that the State lacked just cause for the one-day paper suspension and the penalty imposed was too severe for the offense. The appeal was filed pursuant to Iowa Code section 8A.415(2)(b) which provides in relevant part:

2. Discipline Resolution

b. If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. . . . If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

DAS rule 11—60.2 sets forth the specific measures and procedures for disciplining employees.

11—60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just

cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge. . . . Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

In discipline cases, the State bears the burden of establishing that just cause supports the discipline imposed. *Stein and State of Iowa (Iowa Workforce Dev.)*, 2020 PERB 102304 at 16; *Cole and State of Iowa (Dep't of Human Serv.)*, 2020 PERB 102113, App. A at 19; *Phillips and State of Iowa (Dep't of Human Res.)*, 12-MA-05, App. A at 11. The term "just cause" as used in section 8A.415(2)(b) and DAS rule 11-60.2 is not defined. *Cole*, 2020 PERB 102113, App. A at 19; *Wilkerson-Moore and State of Iowa (Dep't of Human Serv.-Fiscal Mgmt. Div.)*, 2018 PERB 100788, App. A at 13. PERB has long held that just cause determinations "require an analysis of all of the relevant circumstances concerning the conduct which precipitated the disciplinary action and not a mechanical, inflexible application of fixed 'elements' which may or may not have any real applicability to the case under consideration." *Palmer and State of Iowa (Dep't of Corr.)*, 2019 ALJ 102115 at 4; *Hunsaker and State of Iowa (Dep't of Emp't Serv.)*, 90-MA-13 at 40. Instead, the Board looks to the totality of the circumstances, which may include:

Whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a

sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether sufficient evidence or proof of the employee's guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

PERB also considers how other similarly situated employees have been treated as a relevant factor when determining whether just cause exists. *Stein*, 2020 PERB 102304 at 16; *Phillips*, 12-MA-05, App. A at 12. All employees who engage in the same type of conduct must be treated the same unless a reasonable basis exists for a difference in the discipline imposed. *Stein*, 2020 PERB 102304 at 16.

Additionally, the disciplinary letter must contain the reasons for the disciplinary action and that just cause must be determined upon the reasons stated in this document. *Rode & State of Iowa (Dep't of Corr.)*, 2015 ALJ 100041 at 11; *Phillips*, 12-MA-05, App. A at 12; *Eaves & State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14; *Hunsaker*, 90-MA-13 at 46, n.27.

Colbert's one-day paper suspension was based upon violation of the December 15, 2016, work directive which prohibited "[r]aising your voice in an argumentative manner during staff and board meetings," and "[i]nterruptions and rude interactions with staff and board," and required "[p]rofessional conduct during staff meetings, board meetings, and all other interactions with personnel and staff."

Although aware of the work directive, Colbert argues that the directive should have been removed from her personnel file pursuant to Article IV, section 9 of the 2015-2017 collective bargaining agreement. This section provides in relevant part that “[w]ritten reprimands, clarifications of expectations, or other similar memoranda shall be removed from the employee’s personnel file after one (1) year provided no further disciplinary action has been taken against the employee.”⁶ There is no evidence in the record that Colbert has any other disciplinary action in her personnel file. Because the contract language in effect at the time the work directive was issued is controlling, the work directive issued on December 15, 2016, should have been removed from Colbert’s personnel file on December 15, 2017. Consequently, the State should not have used the elapsed work directive as grounds for the one-day paid suspension since the disciplinary letter containing the work directive was issued on October 16, 2018, long after the work directive expired.

The state argues the removal of the directive from Colbert’s personnel file did not change the fact she was aware that this type of behavior was not acceptable and that removal did not “excuse the behavior or grant Colbert a free pass to engage in loud, rude and unprofessional behavior.” It further argues Colbert, as a professional employee, should have known that this type

⁶ Exhibit 20.

of conduct was not acceptable and should not “even need to be addressed through work rules or directives.”

It is unpersuasive for the State to claim that Colbert’s conduct alone was the basis for the discipline. Greenwood in his complaint to the Iowa National Guard alleged Colbert broke the December 15, 2016, work directive. Dolbeare was told the purpose of the investigation was to determine if the work directive was violated, and she found that Colbert violated the work directive. Finally, the disciplinary letter stated that the one-day paid suspension was based upon the violation of the December 15, 2016, work directive. Nowhere in Colbert’s disciplinary letter did the State allege that Colbert’s behavior on its own was unacceptable. Consequently, the State cannot use this new basis to support the one-day paid suspension in this appeal. To do so would be in direct contravention of long-standing PERB case law that just cause must be determined upon the reasons stated in the disciplinary letter. *Rode*, 2015 ALJ 100041 at 13.

In interpreting the language contained in the collective bargaining agreement, I conclude that the work directive should have been removed as of December 15, 2017. Because the outdated work directive formed the sole basis for the State’s issuance of the one-day paid suspension, as provided in the disciplinary letter, I find the State has failed to show the one-day paid suspension is supported by just cause. Accordingly, I propose the following:

ORDER:

The State shall rescind and remove the original and all copies of the one-day paper suspension issued to Colbert on October 16, 2018, as well as remove any other documentation of the suspension from all personnel files maintained by the State concerning Colbert. The State will also take all other actions necessary to place Colbert in the position she would have been in had she not received any discipline.

The costs of reporting and of the agency-requested transcript in the amount of \$619.75 are assessed against the Appellee, State of Iowa (Department of Public Defense), pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State in accordance with PERB subrule 11.9(3).

This proposed decision will become PERB's final agency action on the merits of Colbert's appeal pursuant to PERB rule 621—11.7 unless, within 20 days of the date below, a party aggrieved by the proposed decision files an appeal to the Board or the Board determines to review the proposed decision.

DATED at Des Moines, Iowa, this 21st day of May, 2020.

Susan M. Bolte

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Administrative Law Judge

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